ISHAK HJ SHAARI A

v.

PP

COURT OF APPEAL, PUTRAJAYA B
LOW HOP BING JCA
HISHAMUDIN MOHD YUNUS JCA
ZAHARAH IBRAHIM JCA
[CRIMINAL APPEAL NO: N-09-17-2005]
26 NOVEMBER 2010 C

CRIMINAL PROCEDURE: *Courts - Jurisdiction - Court of Appeal - Inherent powers of Court of Appeal - Whether limited to matters pertaining to practice and procedure in same proceedings only - Whether could be invoked to confer "review jurisdiction" on Court of Appeal* D

CRIMINAL PROCEDURE: *Courts - Jurisdiction - Court of Appeal - Whether Court of Appeal may re-open, re-hear and review its prior decisions - Whether Court of Appeal is conferred with "review jurisdiction" - Federal Constitution art. 121(1B) - Courts of Judicature Act 1964 s. 50(1) - Rules of the High Court, 1980 O. 92 r. 4* E

The applicant/accused applied by way of notice of motion raising the following question of law: "Does the Court of Appeal (as the apex court for the disposal of an appeal originating from a Sessions Court) have the inherent powers to reopen and set aside an earlier F order of the same court, made in the same case in exercise of its appellate jurisdiction, after disposing of the appeal as a final appeal?". The application concerned the reopening of a final appeal which had already been heard and determined by the Court of Appeal as the apex court. The accused sought an order that the G Court of Appeal invoke its inherent powers and set aside the order of the Court of Appeal in Criminal Appeal N-09-17-2005 which allowed the public prosecutor's appeal against the decision of the High Court in Criminal Appeal No. 42-7-2000, wherein the decision of the Sessions Court was affirmed by the Court of Appeal and the H respondent was sentenced to 15 years' imprisonment and five strokes of the rotan. The accused claimed that at the hearing of the appeal in the Court of Appeal, the learned judges of the Court of Appeal had erred in not accepting and affirming the decision of the High Court judge. The prosecution raised a preliminary objection I on the ground that the Court of Appeal had no jurisdiction to hear the notice of motion. The applicant's counsel relied on the review jurisdiction of the Court of Appeal.

A **Held (dismissing the application *in limine*)**
Per Low Hop Bing JCA delivering the judgment of the court (majority):

(1) The accused's notice of motion made no mention whatsoever of
B "review jurisdiction". The accused cannot be assumed to have asked the Court of Appeal to invoke "review jurisdiction". That being the case, the accused's reliance on "review jurisdiction" was wholly without any foundation. (para 9)

(2) The accused's notice of motion was in substance a notice of
C appeal. The notice of motion and supporting affidavit collectively revolved around a re-litigation in the same set of proceedings in which the issue had already been concluded in the prior proceedings in the Court of Appeal. The notice of
D motion was legally unsustainable as the Court of Appeal does not have the jurisdiction to hear and determine an appeal against the decision of the same court, in view of art. 121(1B) of the Federal Constitution ("art. 121(1B)") read with s. 50(1) of the Courts of Judicature Act 1964 ("s. 50(1)"). (para 10)

E **(3)** The substantive provisions enacted in art. 121(1B) and s. 50(1) do not contain any provision which can be construed as conferring any "review jurisdiction" or "inherent powers" on the Court of Appeal. Order 92 r. 4 of the Rules of the High Court,
F 1980 ('O. 92 r. 4') also does not provide for the hearing of such an application to set aside an earlier order of the Court of Appeal. (paras 25 & 37)

(4) The "inherent powers" of the Court of Appeal "to make any order as may be necessary to prevent injustice" etc is only to
G be exercised by the Court of Appeal, if at all, in matters pertaining to practice and procedure and only in the same proceedings. The inherent powers of the Court of Appeal cannot be stretched to include the hearing of a subsequent application in order to invoke the "review jurisdiction" and to set aside an
H earlier decision of the Court of Appeal. (para 37)

(5) The conferment of "review jurisdiction" is not by way of inherent powers. "Review jurisdiction" must be expressly provided by statute. As such, the court had no jurisdiction to
I hear the notice of motion. The question posed was answered in the negative. (para 41)

Per Zaharah Ibrahim JCA (majority):

(1) No statute, whether "Federal law" (as defined in art. 162 cl. (2) of the Federal Constitution), or "written law" as defined in s. 3 of the Interpretation Acts 1948 and 1967, provides for the jurisdiction or power of the Court of Appeal to review a matter which it has already finally determined, except in the circumstances provided for in s. 42 and s. 44 of the Courts of Judicature Act, 1964. There being no statutory provision which can apply the common law of England to a situation such as that before the court in this application, the common law of England cannot be drawn upon to found the basis of an inherent jurisdiction or power that the Court of Appeal was being urged to exercise. (paras 108 & 111)

(2) The re-opening, re-hearing, re-examination or review of a matter which has already been finally determined by a court is not merely a procedural issue but is a substantive one. It is therefore a matter of jurisdiction. Unless and until jurisdiction is granted by law, the Court of Appeal has no such jurisdiction. (para 127)

Per Hishamudin Mohd Yunus JCA (dissenting):

(1) There have already been two previous judgments of the Court of Appeal that ruled that the Court of Appeal has the inherent power to review its own previous decision under exceptional circumstances in order to prevent an injustice being occasioned or to prevent an abuse of the process of the court, particularly where the previous decision was made by the Court of Appeal sitting as a court of last resort. They are *Ramanathan Chelliah v. PP* and *PP v. Abdullah Idris*. Hence, the court is bound by its previous decisions in *Ramanathan* and *Abdullah Idris*. (para 53)

(2) The Federal Court and the Court of Appeal have the inherent jurisdiction or powers to review their own previous decisions in exceptional circumstances where the court is satisfied that it is necessary to do so in order to prevent an injustice being occasioned by the previous decision or to prevent an abuse of the process of the court, particularly when that previous decision was made by the Court of Appeal sitting as a court of last resort. The source of these inherent powers is the judicial power that is vested on the judiciary by the Federal Constitution, in particular, art. 121. These inherent powers are powers that the courts must have in order to dispense justice effectively and the

limits of these inherent powers, are difficult to define. Neither art. 121 nor s. 50 diminish the inherent powers either of the Federal Court or of the Court of Appeal. Article 121 confers the judicial power on the courts, and the courts in exercising that judicial power must of necessity have the inherent powers so that justice could be mete out effectively and in a meaningful manner. (para 66)

Bahasa Malaysia *Translation Of Headnotes*

Pemohon/perayu memohon melalui notis usul membangkitkan persoalan undang-undang berikut: "Sama ada Mahkamah Rayuan (sebagai mahkamah tertinggi bagi rayuan yang asalnya dari Mahkamah Sesyen dilupuskan) mempunyai kuasa-kuasa sedia ada untuk membuka semula dan mengenepikan perintah terdahulu mahkamah yang sama, yang diperbuat di dalam kes dalam perlaksanaan keupayaan rayuan, selepas rayuan dilupuskan sebagai rayuan terakhir?" Permohonan adalah mengenai pembukaan semula rayuan terakhir yang sudah dibicarakan dan diputuskan oleh Mahkamah Rayuan sebagai mahkamah tertinggi. Tertuduh memohon perintah bahawa Mahkamah Rayuan menggunakan kuasa sedia adanya dan mengenepikan perintah Mahkamah Rayuan di dalam Rayuan Jenayah N-09-17-2005 yang membenarkan rayuan pihak pendakwaraya terhadap keputusan Mahkamah Tinggi di dalam Rayuan Jenayah No. 42-7-2000, di mana keputusan Mahkamah Sesyen disahkan oleh Mahkamah Rayuan dan responden telah dihukum penjara 15 tahun dan lima sebatan rotan. Tertuduh mendakwa bahawa semasa perbicaraan rayuan di dalam Mahkamah Rayuan, yang arif hakim-hakim Mahkamah Rayuan telah khilaf apabila tidak menerima dan mengesahkan keputusan hakim Mahkamah Tinggi. Pihak pendakwaraya telah membangkitkan bantahan awalan bahawa Mahkamah Rayuan tidak mempunyai bidangkuasa untuk membicara notis usul. Peguam pemohon merujuk kepada bidangkuasa pengkajian Mahkamah Rayuan.

Diputuskan (menolak permohonan *in limine*)

Oleh Low Hop Bing HMR menyampaikan penghakiman mahkamah (majoriti):

(1) Notis usul tertuduh tidak menyebut apa-apa mengenai "bidangkuasa pengkajian". Tertuduh tidak boleh dianggap telah bertanya kepada Mahkamah Rayuan untuk menggunakan "bidangkuasa pengkajian". Kerana itu, pergantungan kepada "bidangkuasa pengkajian" secara keseluruhannya tidak mempunyai asas.

(2) Notis usul tertuduh adalah dalam substans notis rayuan. Notis usul dan afidavit sokongan secara kolektif berkisar pada perbicaraan semula di dalam prosiding yang sama di mana isu telahpun diputuskan di dalam prosiding sebelumnya di Mahkamah Rayuan. Notis usul adalah silap dari segi undang-undang kerana Mahkamah Rayuan tidak mempunyai bidangkuasa untuk membicara dan memutuskan rayuan terhadap keputusan mahkamah yang sama, memandangkan Perkara 121(1B) Perlembagaan Persekutuan ("Perkara 121(1B)") dibaca dengan s. 50(1) Akta Mahkamah Kehakiman ("s. 50(1)").

(3) Peruntukan-peruntukan tetap yang terdapat di dalam Perkara 121(1B) dan s. 50(1) tidak mengandungi apa-apa peruntukan yang boleh ditafsirkan sebagai memberikan "bidangkuasa pengkajian" atau "kuasa-kuasa sedia ada" pada Mahkamah Rayuan. Arahan 92 k. 4 Kaedah-Kaedah Mahkamah Tinggi 1980 (A. 92 k. 4) juga tidak membekalkan bagi perbicaraan satu permohonan untuk mengenepikan perintah sebelumnya Mahkamah Rayuan.

(4) "Kuasa-kuasa sedia ada" Mahkamah Rayuan "untuk membuat apa-apa perintah yang diperlukan untuk menghalang ketidakadilan" dll, hanya boleh dilaksanakan oleh Mahkamah Rayuan, jika langsung, dalam perkara-perkara yang ada kena mengena dengan latihan dan prosedur dan hanya dalam prosiding yang sama. Kuasa-kuasa sedia ada Mahkamah Rayuan tidak boleh dipanjangkan untuk memasukkan perbicaraan permohonan seterusnya supaya boleh menggunakan "bidangkuasa pengkajian" dan untuk mengenepikan keputusan sebelumnya Mahkamah Rayuan.

(5) Penganugerahan "bidangkuasa pengkajian" bukan melalui kuasa-kuasa sedia ada. "Bidangkuasa pengkajian" hendaklah dengan nyata diperuntukkan oleh statut. Oleh itu, mahkamah tidak mempunyai bidangkuasa untuk membicarakan notis usul. Persoalan yang diberikan telah dijawab dengan negatif.

Oleh Zaharah Ibrahim (HMR) (majoriti)

(1) Tiada statut, sama ada "Undang-Undang Persekutuan" (seperti yang ditakrifkan di dalam Perkara 162 kl.(2) Perlembagaan Persekutuan), atau "undang-undang bertulis" seperti yang ditakrifkan s. 3 Akta Tafsiran 1948 dan 1967, menyediakan bidangkuasa atau kuasa Mahkamah Rayuan untuk mengkaji semula perkara yang telah diputuskan secara muktamad, kecuali

dalam keadaan-keadaan yang disediakan di dalam s. 42 dan s. 44 Akta Mahkamah Kehakiman 1964. Oleh kerana tidak terdapat peruntukan statutori yang boleh menggunapakai undang-undang common England pada situasi seperti itu di hadapan mahkamah dalam permohonan ini, undang-undang common England tidak boleh digunakan untuk mendapati dasar satu bidangkuasa sedia ada atau kuasa yang Mahkamah Rayuan diseru untuk melaksanakan.

(2) Pembukaan semula, pendengaran semula, pemeriksaan semula dan pengkajian semula perkara yang telah diputuskan secara muktamad oleh mahkamah bukanlah isu prosedural tetapi isu yang substantif. Oleh itu ia adalah perkara bidangkuasa. Melainkan dan sehingga bidangkuasa dibenarkan oleh undang-undang, Mahkamah Rayuan tidak mempunyai bidangkuasa.

Oleh Hishamudin Mohd Yunus HMR (menentang):

(1) Sudah terdapat dua penghakiman sebelumnya Mahkamah Rayuan yang memutuskan bahawa Mahkamah Rayuan mempunyai kuasa sedia ada untuk mengkaji semula keputusan-keputusannya sebelum ini di bawah keadaan-keadaan luarbiasa supaya dapat menghalang ketidakadilan terjadi atau untuk menghalang penyalahgunaan proses mahkamah, terutama sekali di mana keputusan sebelumnya telah dibuat oleh Mahkamah Rayuan sebagai mahkamah jalan terakhir. Penghakiman-penghakiman tersebut adalah *Ramanathan Chelliah v. PP* dan *PP v. Abdullah Idris*. Oleh itu, mahkamah terikat dengan keputusan-keputusannya sebelum ini di dalam kes *Ramanathan* dan *Abdullah Idris*.

(2) Mahkamah Persekutuan dan Mahkamah Rayuan mempunyai bidangkuasa dan kuasa sedia ada untuk mengkaji semula keputusan-keputusan mereka sebelum ini dalam keadaan-keadaan luarbiasa di mana mahkamah berpuas hati bahawa ia perlu bertindak sedemikian supaya dapat menghalang ketidakadilan dari berlaku oleh keputusan sebelumnya atau untuk menghalang penyalahgunaan proses mahkamah, terutama sekali apabila keputusan terdahulu dibuat oleh Mahkamah Rayuan yang berfungsi sebagai mahkamah akhir jalan. Sumber kuasa-kuasa sedia ada ini adalah kuasa kehakiman yang dikurniakan kepada badan kehakiman oleh Perlembagaan Persekutuan, terutama sekali, Perkara 121. Kuasa-kuasa sedia ada ini adalah kuasa yang mahkamah perlu ada supaya

melaksanakan keadilan secara efektif dan had-had kuasa sedia ada ini, adalah susah untuk mentakrifkan. Perkara 121 dan juga s. 50 tidak kurangkan kuasa sedia ada sama ada bagi Mahkamah Persekutuan atau Mahkamah Rayuan. Perkara 121 memberi kuasa kehakiman kepada mahkamah-mahkamah, dan mahkamah-mahkamah dalam melaksanakan kuasa kehakiman itu mestilah mempunyai kuasa-kuasa sedia ada supaya keadilan boleh dijalankan secara efektif dan dengan cara yang bermakna.

Case(s) referred to:

Abdul Razak Dalek v. PP [2010] 6 CLJ 357 FC ***(refd)***

Adorna Properties Sdn Bhd v. Kobchai Sosothikul [2005] 1 CLJ 565 FC ***(refd)***

Allied Capital Sdn Bhd v. Mohd Latiff Shah Mohd & Another Application [2004] 4 CLJ 350 FC ***(refd)***

Anantharaju Shetty v. Appu Hegade, AIR [1919] Mad 244 ***(refd)***

Asean Security Paper Mills Sdn Bhd v. Mitsui Sumitomo Insurance (Malaysia) Bhd [2008] 6 CLJ 1 FC ***(refd)***

Azlan Alias v. PP (Criminal Application No: D-09-22-04) (Unreported) ***(refd)***

Badan Peguam Malaysia v. Kerajaan Malaysia [2009] 1 CLJ 833 FC ***(refd)***

Bremer Vulcan Schiffbau und Maschinenfabrik v. South India Shipping Corp [1981] 1 All ER 289 ***(refd)***

Chan Yock Cher v. Chan Teong Peng [2004] 4 CLJ 533 FC ***(refd)***

Chia Yan Tek & Anor v. Ng Swee Kiat & Anor [2001] 4 CLJ 61 FC ***(refd)***

Chu Tak Fai v. PP [2006] 4 CLJ 931 FC ***(refd)***

Connelly v. DPP [1964] 2 All ER 401 ***(refd)***

Dato' Seri Anwar Ibrahim v. PP [2010] 7 CLJ 397 FC ***(refd)***

Dato' Seri Anwar Ibrahim v. PP [2004] 4 CLJ 157 FC ***(refd)***

Drew v. Willis [1981] 1 QB 450 ***(refd)***

Fernandes v. Ranganayakulu AIR 1953 Mad 236 ***(refd)***

Harbhajan Singh v. Karam Singh AIR (53) [1966] SC 641 ***(refd)***

Kwong Yik Bank Bhd v. Ansonia Management Associates Sdn Bhd [1999] 1 CLJ 337 CA ***(refd)***

Lee Lee Cheng v. Seow Peng Kwang [1960] MLJ 1 ***(refd)***

Lye Thai Sang & Anor v. Faber Merlin (M) Sdn Bhd & Ors & Another Case [1985] 2 CLJ 423; [1985] CLJ (Rep) 196 SC ***(refd)***

Megat Najmuddin Dato' Seri (Dr) Megat Khas v. Bank Bumiputra (M) Bhd [2002] 1 CLJ 645 FC ***(refd)***

MGG Pillai v. Tan Sri Dato' Vincent Tan Chee Yioun [2002] 3 CLJ 577 FC ***(refd)***

PM Hendry v. George John Se Cruz [1948] 1 LNS 39 HC ***(refd)***

PP v. Abdullah Idris [2009] 5 CLJ 445 CA ***(refd)***

R v. Gould [1968] 2 QB 65 ***(refd)***

Raja Prithwi Chand v. Sukhraj Rai AIR 1941 ***(refd)***

Ramananthan Chelliah v. PP [2009] 6 CLJ 55 CA ***(refd)***

Re Uddin (A Child) (Serious Injury: Standard Of Proof) [2005] 3 All ER 550 ***(refd)***

A *Sia Cheng Soon & Anor v. Tengku Ismail Tengku Ibrahim [2008] 5 CLJ 201 FC* ***(refd)***
Taylor And Another v. Lawrence And Another [2002] All ER 353 ***(refd)***
Trilok Singh v. State Transport Authority, Bihar AIR [1985] Patna 87 ***(refd)***
B *Venkata Narasimha Appa Row v. The Court of Wards & Ors [1886] 11 AC 660* ***(refd)***
Wicks v. Wicks [1998] 1 All ER 470 ***(refd)***
Young v. Bristol Aeroplane Co Ltd [1944] 2 All ER 293 ***(refd)***

Legislation referred to:
C Civil Law Act 1956, s. 3(1)(a)
Courts of Judicature Act 1964, ss. 4, 16, 17, 42(2), (3), 44, 50(1), 86, 87, 96
Federal Constitution, arts. 4, 121(1), (1B), (2), 162(2), 172,
Interpretation Acts 1948 and 1967, s. 3
Penal Code, ss. 354, 376
D Rules of the Court of Appeal 1994, r. 4
Rules of the Federal Court 1995, r. 137
Rules of the High Court 1980, O. 53, O. 92 r. 4

For the appellant/applicant - Karpal Singh (C C Lim with him); M/s Karpal Singh & Co
E *For the respondent - Awang Armadajaya (Murtazadi Amran with him) DPPs; AG's Chambers*

[Appeal from High Court, Seremban; Criminal Appeal No: 42-7-2000]

F *Reported by Amutha Suppayah*

JUDGMENT

G **Low Hop Bing JCA:**

Important Question Of Law

[1] This application by way of notice of motion was filed by the applicant ("the accused"). We heard the application on 5 October
H 2010. Judgment was reserved. We now deliver our separate judgments.

[2] This application raises a question of law of general public importance. It concerns the reopening of a final appeal which had
I already been heard and determined by the Court of Appeal as the apex court. The question may be formulated as follows:

Does the Court of Appeal (as the apex Court for the disposal of an appeal originating from a Sessions Court) have the inherent powers to reopen and set aside an earlier order of the same Court, made in the same case in exercise of its appellate jurisdiction, after disposing of the appeal as a final appeal?

Notice Of Motion

[3] The notice of motion and supporting affidavit contain a narrative of the proceedings prior to this application.

[4] The notice of motion, expressed in the National Language, seeks an order which reads:

untuk suatu perintah agar mahkamah Yang Mulia ini menggunakan kuasa-kuasa (inherent power) sedia ada dan mengenepikan perintah Mahkamah Rayuan dalam Rayuan Jenayah N-09-17-2005 yang membenarkan rayuan Pendakwa Raya terhadap keputusan Mahkamah Tinggi Seremban Rayuan Jenayah No. 42-7-2000 dimana keputusan Mahkamah Sesyen Seremban adalah disahkan oleh Mahkamah Rayuan dan dimana responden dikenakan hukuman penjara selama 15 tahun bermula dari tarikh 13 Oktober 2008 dan 5 kali sebatan rotan, ataupun apa jua perintah yang lain yang difikirkan patut dan adil oleh Mahkamah Yang Mulia ini.

[My Translation]

for an order that this Honourable Court invoke its inherent powers and set aside the order of the Court of Appeal in Criminal Appeal N-09-17-2005 which allowed the Public Prosecutor's appeal against the decision of the Seremban High Court in Criminal Appeal No. 42-7-2000, wherein the decision of the Sessions Court Seremban was affirmed by the Court of Appeal and the respondent was sentenced to 15 years imprisonment with effect from 13 October 2008 and 5 strokes of the rotan, or such other order as this Honourable Court deems proper and just.

[5] The supporting affidavit was affirmed by the accused's lawyer. Paragraphs 5 to 9 of the affidavit are relevant. They are reproduced below:

5. Sesalinan rekod rayuan dan petisyen rayuan dieksibitkan di sini dan ditanda secara kolektif sebagai 'KS1'.

6. Saya dengan segala hormatnya menyatakan disini bahawa rujukan sepenuhnya akan dibuat kepada rekod rayuan serta petisyen rayuan yang difailkan oleh perayu pada tarikh pendengaran permohonan ini.

A

7. Saya dengan segala hormatnya menyatakan disini bahawa pada pendengaran rayuan ini di Mahkamah Rayuan pada 13.10.2008 Yang Arif-Yang Arif Hakim Mahkamah Rayuan yang bijaksana telah terkhilaf apabila tidak menerima dan mengesahkan keputusan Hakim Mahkamah Tinggi, khususnya penghakiman di perenggan kedua dari terakhir dalam alasan penghakiman beliau seperti berikut:

B

> Mengikut keterangan, kain cadar yang menutup tilam dan katil telah diberikan kepada Jabatan Kimia untuk dianalisa. Hasil dari pemeriksaan Ahli Kimia tiada sebarang kesan air mani atau darah ditemui dari cadar tersebut. Sesungguhnya keterangan pengadu menghubung dengan episode apa yang berlaku adalah tidak konsisten dengan penemuan Ahli Kimia. Akibatnya sedikit banyak timbullah keraguan terhadap keterangan pengadu samaada berlaku persetubuhan seperti yang didakwa.

C

D

Yang Arif Hakim Mahkamah Tinggi telah membuat satu keputusan kukuh yang menimbulkan lebih daripada keraguan yang munasabah terhadap keterangan pengadu dimana keterangan tersebut bersifat bercanggah dan tidak konsisten. Keterangan pengadu tidak mempunyai kebolehpercayaan dan maka itu persoalan sokongan bagi keterangan tersebut tidak timbul.

E

8. Kes bagi pendakwaan amat bersandar kepada keterangan SP4, Baktiar bin Kassim, iaitu Ahli Kimia; SP10, Dr Chung Lay Hong iaitu doktor yang memeriksa pengadu; dan SP15, Ragespari a/p Arunanidi, iaitu pegawai penyiasat. Intipati utama dalam kes pendakwaan ialah unsur yang akhirnya meranapkan kes pendakwaan sendiri.

F

9. Merujuk kepada alasan-alasan sepertimana di atas, saya dengan segala hormatnya menyatakan bahawa Mahkamah Rayuan harus menggunapakai kuasa yang sedia ada untuk membetulkan ketidakadilan yang manifes ini. Kes responden ialah satu kes yang khas dan yang bermerit bagi memohon kepada Mahkamah Yang Mulia ini bagi satu perintah seperti yang dipohon atau bagi apa jua perintah lain yang difikirkan sesuai dan manfaat oleh Mahkamah Yang Mulia ini.

G

H

[My Translation]

5. A copy of the record of appeal and petition of appeal is exhibited hereto and marked collectively as 'KS1'.

I

6. I hereby respectfully aver that full reference will be made to the record of appeal and the petition of appeal on the date of hearing of this application.

7. I hereby respectfully aver that at the hearing of this appeal in the Court of Appeal on 13.10.2008, their Lordships the learned Judges of the Court of Appeal erred in not accepting and affirming the decision of the High Court Judge, in particular the penultimate paragraph of his judgment as follows:

> According to the evidence, the bedsheet which covered the mattress and the bed had been handed to the Chemistry Department for analysis. The result of the Chemist's examination: no trace of seminal fluid and blood from the bedsheet. Actually, the complainant's evidence in relation to what had happened in the episode was not consistent with the finding of the Chemist. Consequently, some doubt was raised in the complainant's evidence as to whether sexual intercourse had taken place as alleged.

The learned Judge of the High Court had made a firm decision which raised more than a reasonable doubt in the complainant's evidence which was contradictory and inconsistent. The complainant's evidence lacked credibility and so corroboration for that evidence did not arise.

8. The prosecution's case relied heavily on the evidence of PW4 Baktiar bin Kassim, the Chemist; PW10 Dr Chung Lay Hong, the doctor who examined the complainant; and PW15 Ragespari a/p Arunanidi, the investigating officer. The main ingredient in the prosecution's case has eventually destroyed its own case.

9. By reference to the above grounds, I respectfully aver that the Court of Appeal ought to exercise its inherent powers to correct this manifest injustice. The respondent's case is a special case which merits applying to this Honourable Court for an order in terms or such other order which this Honourable Court deems fit and proper.

Preliminary Objection

[6] Learned deputy public prosecutor Mr Awang Armadajaya (assisted by Mr Murtazadi bin Amran) raised a preliminary objection on the ground that this court has no jurisdiction to hear this notice of motion.

[7] Applicant's learned counsel Mr Karpal Singh (assisted Mr C C Lim) relied on "the review jurisdiction" of this court which he submitted has been dealt with in detail in *Ramananthan Chelliah v. PP* [2009] 6 CLJ 55 CA, and cited with approval by the Federal Court in *Chu Tak Fai v. PP* [2006] 4 CLJ 931 FC. He also sought

A support in *Taylor And Another v. Lawrence And Another* [2002] 2 All ER 353; *Re Uddin* [2005] 3 All ER 550; and *PP v. Abdullah Idris* [2009] 5 CLJ 445 CA. They asked this court to exercise its inherent powers to set aside the order made by this court on 13 October 2008.

B

[8] These submissions bring into focus two issues. They are:

(1) the true nature of the instant application; and

(2) "the inherent powers" of this court.

C

True Nature Of Application

[9] It is pertinent for me to determine the true nature of the instant application. I note that the accused's notice of motion made no mention whatsoever of "review jurisdiction". The accused cannot D be assumed to have asked the Court of Appeal to invoke "review jurisdiction". That being the case, the accused's reliance on "review jurisdiction" is wholly without any foundation.

[10] The accused's notice of motion is in substance a notice of E appeal. The accused was in fact dissatisfied with the conviction and sentence meted out by the Court of Appeal in the disposal of his final appeal. Against the conviction and sentence, he has preferred his appeal, by way of an application which was couched in the notice of motion. He sought to persuade the Court of Appeal to set F aside the conviction and sentence of the court with equal standing. The supporting affidavit is in effect a petition of appeal. It states shortly the substance of the judgment appealed against and contains definite particulars of points of law or fact which the Court of Appeal was alleged to have erred. The notice of motion and G supporting affidavit collectively revolve around a re-litigation in the same set of proceedings in which the issue had already been concluded in the prior proceedings in the Court of Appeal. The accused is actually moving this court to invoke inherent powers in order to exercise criminal appellate jurisdiction which this court has H already exercised in the prior proceedings. The notice of motion is legally unsustainable as the Court of Appeal does not have the jurisdiction to hear and determine an appeal against the decision of the same court, in view of art. 121(1B) of the Federal Constitution ("art. 121(1B)") read with s. 50(1) of the Courts of Judicature Act I 1964 ("s. 50(1)").

[11] Art. 121, reads:

121. Judicial power of the Federation

...

(1B) There shall be a court which shall be known as the Mahkamah Rayuan (Court of Appeal) and shall have its principal registry at such place as the Yang di-Pertuan Agong may determine, and the Court of Appeal shall have the following jurisdiction, that is to say:

(a) jurisdiction to determine appeals from decisions of a High Court or a judge thereof (except decisions of a High Court given by a registrar or other officer of the Court and appealable under federal law to a judge of the Court); and

(b) such other jurisdiction as may be conferred by or under federal law.

[Am. Act A1260]

[12] Section 50(1) confers criminal appellate jurisdiction upon the Court of Appeal in the following words:

50. Jurisdiction to hear and determine criminal appeals

(1) Subject to any rules regulating the proceedings of the Court of Appeal in respect of criminal appeals, the Court of Appeal shall have jurisdiction to hear and determine any appeal against any decision made by the High Court:

(a) in the exercise of its original jurisdiction; and

(b) in the exercise of its appellate or revisionary jurisdiction in respect of any criminal matter decided by the Sessions Court.

[13] Pursuant to s. 50(1), the Court of Appeal may exercise criminal appellate jurisdiction to hear and determine criminal appeals:

(a) where the appeal is against any decision of the High Court in the exercise of the High Court's original jurisdiction; and

(b) where the appeal is against the decision of the High Court in the exercise of the High Court's appellate or revisionary jurisdiction in respect of any criminal matter decided by the Sessions Court.

[14] The Court of Appeal does not have any criminal appellate jurisdiction to hear and determine criminal appeals which had finally been disposed of by the same court. Article 121(1B) and s. 50(1) have never contemplated the existence of the inherent powers of the Court of Appeal in the exercise of criminal appellate jurisdiction. The jurisdiction of the Court of Appeal is so important that Parliament has deemed it necessary to enshrine it in the Federal Constitution which is the supreme law of the land under art. 4 thereof. The importance of this jurisdiction is reaffirmed by Parliament when it enacted s. 50(1) which, in terms of supremacy in relation to any other written law, is only one step below the Federal Constitution. This has been expressly provided under s. 4 of the same Act ie, the provisions of this Act shall prevail, in the event of inconsistency or conflict between this Act and any other written law other than the Federal Constitution in force at the commencement of this Act. In the circumstances, I hold that the instant application, which in fact is an appeal against the earlier order of the Court of Appeal, is beyond the jurisdiction of the Court of Appeal, as set out in art. 121(1B) and s. 50(1).

Inherent Powers

[15] In considering the second and final issue based on "inherent powers" of the Court of Appeal, it is necessary for me to examine the position in the Federal Court and the Court of Appeal respectively.

[16] In the Federal Court, inherent powers in the context of "review jurisdiction" was discussed in *Dato' Seri Anwar Ibrahim v. PP* [2004] 4 CLJ 157. The issue was whether r. 137 of the Rules of the Federal Court 1995 (r. 137) confers "review jurisdiction" on the Federal Court. Rule 137 reads as follows:

> **Rule 137. Inherent powers of the Court**
>
> For the removal of doubts it is hereby declared that nothing in these Rules shall be deemed to limit or affect the inherent powers of the Court **to hear any application or** to make any orders as may be necessary to prevent injustice or to prevent an abuse of the process of the Court. (emphasis added)

[17] In essence, Abdul Malek Ahmad PCA (as he then was) in paras [44] and [45] held that the Federal Court has the jurisdiction to hear an application under r. 137 where it is found necessary to prevent injustice or to prevent an abuse of the process of the Federal Court.

[18] In *Asean Security Paper Mills Sdn Bhd v. Mitsui Sumitomo Insurance (Malaysia) Bhd* [2008] 6 CLJ 1 FC, Abdul Hamid Mohamad CJ (Malaysia) in paras [4] to [12] stressed that the "review jurisdiction" is limited in scope, as shown below:

> [4] In **an application for a review by this court** of its own decision, the court must be satisfied that it is a case that falls within the limited grounds and very exceptional circumstance in which a review may be made. Only if it does, that the court reviews its own earlier judgment. **Under no circumstances should the court position itself as if it were hearing an appeal and decide the case as such**. In other words, it is not for the court to consider whether this court had or had not made a correct decision on the facts. That is a matter of opinion. Even on the issue of law, it is not for this court to determine whether this court had earlier, in the same case, interpreted or applied the law correctly or not. That too is a matter of opinion. An occasion that I can think of where this court may review its own judgment in the same case on question of law is where the court had applied a statutory provision that has been repealed. I do not think that review power should be exercised even where the earlier panel had followed certain judgments and not the others or had overlooked the others. Not even where the earlier panel had disagreed with the court's earlier judgments. If a party is dissatisfied with a judgment of this court that does not follow the court's own earlier judgments, the matter may be taken up in another appeal in a similar case. That is what is usually called "revisiting". Certainly, it should not be taken up in the same case by way of a review. That had been the practice of this court all these years and it should remain so. Otherwise, there will be no end to litigation. A review may lead to another review and a further review. This court has so many times warned against such attempts. (emphasis added)
>
> See:
>
> 1. *Lye Thai Sang & Anor v. Faber Merlin (M) Sdn Bhd* [1985] 2 CLJ 423; [1985] CLJ (Rep) 196.
> 2. *Adorna Properties Sdn Bhd v. Kobchai Sosothikul* [2005] 1 CLJ 565.
> 3. *Allied Capital Sdn Bhd v. Mohd Latiff bin Shah Mohd & Another Application* [2004] 4 CLJ 350, in particular the dissenting judgment of Abdul Hamid Mohamad, FCJ.

A

4. *Tai Chai Yu v. The Chief Registrar of the Federal Court* [1998] 2 CLJ 358.

5. *Chan Yock Cher v. Chan Teong Peng* [2005] 4 CLJ 29.

6. *Chu Tak Fai v. Public Prosecutor* [2006] 4 CLJ 931.

B

[5] Coming back to r. 137 of the RFC 1995, I have dealt at length on the effect of the rule in *Abdul Ghaffar Md Amin v. Ibrahim Yusoff & Anor* [2008] 5 CLJ 1 and in *Sia Cheng Soon & Anor v. Tengku Ismail Tengku Ibrahim* [2008] 5 CLJ 201. In the former case I concluded:

C

> *In other words, rule 137 cannot be construed as to confer any new jurisdiction to the existing jurisdiction of the Federal Court as spelt out under the Federal Constitution, the Courts of Judicature Act and other statutes*. (emphasis added)

D

[6] However, I accept that, in very limited and exceptional cases, this court does have the inherent jurisdiction to review its own decision. I must stress again that this jurisdiction is very limited in its scope and must not be abused. I have no difficulty in accepting that inherent jurisdiction may be exercised in the following instances:

E

[7] First, where there is a lack of quorum as in *Chia Yan Tek & Anor v. Ng Swee Kiat & Anor* [2001] 4 CLJ 61 where two of the presiding judges had retired at the time when the judgment was delivered and only one judge remaining who was capable of exercising his functions as a judge of that court.

F

[8] Secondly, where the decision had been obtained by fraud or suppression of material evidence as in *MGG Pillai v. Tan Sri Dato' Vincent Tan Chee Yioun* [2002] 3 CLJ 577.

G

[9] Thirdly, where there is a clear infringement of statutory law. In this respect, a clear example would be where the court has mistakenly applied a repealed law. But, where it is a matter of interpretation or application of the law, it is in my view not a suitable case for a review. The judgment of this court in *Adorna Properties Sdn Bhd v. Kobchai Sosotikul* [2005] 1 CLJ 565 does throw some light in this respect.

H

[10] Fourthly, where application for review has not been heard by this court but, through no fault of the applicant, an order was inadvertently made as if he has been heard as in *Raja Prithwi Chand Lal Choudhury v. Sukraj Rai and Others* AIR [1941].

I

[11] Fifthly, where bias has been established as in *Taylor & Anor v. Lawrence & Anor* [2002] 2 All ER 353. A

[12] Of course, there may be other circumstances. But, the review jurisdiction should never be allowed to be used to question a finding of this court in an appeal on question of facts. B

[19] In considering r. 137 in the same case ie, *Asean Security Paper Mills Sdn Bhd*, *supra*, Zaki Azmi PCA (now CJ (Malaysia)) in the following paragraphs, has this to say:

[29] It will be noticed that the rule starts with the words "For the removal of doubts ..." It is therefore clear that this rule does not actually confer the jurisdiction to hear any application or to make any order to prevent injustice or abuse of the process of the court. It is merely a reminder that this court has that inherent jurisdiction. C D

...

Inherent Jurisdiction

[36] What then is the meaning of inherent jurisdiction? According to the Concise Oxford Dictionary, "inherent" means "existing in something, esp. as a permanent or characteristic attribute." In the context of the law, that inherent jurisdiction is deemed to be part of the court's power to do all things reasonably necessary to ensure fair administration of justice within its jurisdiction subject to valid existing laws including the Constitution. In other words, that inherent power is found within the very nature of a court of law, unlike power conferred by statute. E F

[37] The *Halsbury's Laws of England*, 4th edn in vol 37 at para 12 refers to "inherent jurisdiction" as follows: G

> In sum, it may be said that the inherent jurisdiction of the court is a virile and viable doctrine, and has been defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent vexation or oppression, to do justice between the parties and to secure a fair trial between them. H

[38] In *Bremer Vulkan v. South India Shipping* [1981] 1 All ER 289 at 295, Lord Diplock explained that 'inherent power' and 'inherent jurisdiction' were confined to the doing by the court I

A of acts which it needs **must have power to do in order to maintain its character as a court of justice**. (emphasis added)

[39] There is no doubt that this court has that authority to allow this application. Whether it does so, depends on the
B circumstances of each case. This court has on many previous occasions decided that it has the right to order a review of its own decision to prevent injustice or an abuse of the process of the court. It has that very wide discretion. However, that wide discretion will not be used liberally but only sparingly, in
C exceptional cases and on a case to case basis where a significant injustice had probably occurred and there was no alternative effective remedy. The court must exercise strong control over such application. It must be satisfied that it is within exceptional category. Rule 137 cannot be construed as conferring unlimited power to review its earlier decision for
D whatever purpose. The court must not be too eager to invoke the rule.

[45] There must be a finality to deciding any dispute. It cannot be reviewed *ad infinitum*. It must end somewhere and in our system, it is the Federal Court. If there is any intention that
E r. 137 be read as conferring appellate jurisdiction, this court cannot also sit as an appellate court to hear appeals from itself. (See art. 128 of the Federal Constitution and the decisions of the Federal Court in the cases of *Abdul Ghaffar Md Amin v. Ibrahim Yusoff & Anor* [2008] 5 CLJ 1 and *Sia*
F *Cheng Soon & Anor v Tengku Ismail Tengku Ibrahim* [2008] 5 CLJ 201).

[20] In *Sia Cheng Soon & Anor v. Tengku Ismail Tengku Ibrahim* [2008] 5 CLJ 201, in para [46], [47] and [51], Arifin Zakaria FCJ (now CJ(M)), in construing r. 137 stressed that:
G

(a) The purpose and scope of the Rules of the Federal Court 1995 made under ss. 16 and 17 of the Courts of Judicature Act 1964 is for regulating the practice and procedure to be followed by the Federal Court in all causes and matters
H whatsoever in or with respect to which the Federal Court has for the time being jurisdiction;

(b) But as a subsidiary legislation, it cannot exceed the powers conferred by the statute pursuant to which it is made. Therefore, it cannot purport to confer new jurisdiction where
I none existed before or enlarge the jurisdiction, or create or

alter substantive rights. Therefore, it will be *ultra vires* the powers of the Rules Committee to attempt to confer on the Federal Court the power to deal with a matter which is outside its jurisdiction; and

(c) This rule must strictly be confined to procedural matter only. Rule 137 could not have been intended to override the provision of the Federal Constitution or any other written law.

[21] In addition to and in continuation of the principles set out in [20](1), (2) and (3) above, it is useful to summarize other relevant principles which may be distilled from the above Federal Court judgments in relation to the scope of r. 137, as follows:

(d) The application must expressly seek the invocation of "review jurisdiction" by the Federal Court;

(e) The Federal Court cannot position itself as if it were hearing an appeal and decide the case as such;

(f) Rule 137 cannot be so construed as to confer any new jurisdiction to the existing jurisdiction of the Federal Court as spelt out under the Federal Constitution, the Courts of Judicature Act 1964 and other statutes; and

(g) Rule 137 does not actually confer the jurisdiction to hear any application. It is merely a reminder that the Federal Court has that inherent jurisdiction.

[22] It is interesting to note that in *Dato' Seri Anwar Ibrahim v. PP* [2010] 7 CLJ 397 FC, Zulkefli Makinudin FCJ and Heliliah Mohd Yusof FCJ expressed the majority view that under r. 137, the Federal Court may exercise "review jurisdiction" in limited circumstances. At pp. 437 and 438; and pp. 441 and 442, Mohd Ghazali Mohd Yusoff, FCJ, in a minority judgment, held that "in light of art. 121(2) of the Federal Constitution ('FC') and ss. 86 and 87 of the Courts of Judicature Act 1964 ('CJA'), the Federal Court has no power to review its own judgment. The word "review" does not appear at all in art. 121(2) FC or ss. 86 and 87 CJA or even r. 137 RFC for that matter. There is not even an indication that this court can exercise the power of review; such power cannot be implied. ... the powers of the Federal Court cannot be enlarged through the Rules of the Federal Court 1995. Only an Act of Parliament can do that. It is incorrect to say that on an application

A by a party to an appeal already decided by this court, this court has the power to rehear the appeal and review its earlier decision. Rule 137 RFC surely does not confer such a power."

[23] So much for the "review jurisdiction" of the Federal Court.

B **[24]** In relation to the Court of Appeal, an analysis of its inherent powers must be preceded by a discussion of the jurisdiction of the Court of Appeal. This is enshrined in art. 121(1B) and s. 50(1). These statutory provisions brought about the creation and establishment of the Court of Appeal in 1994.

C **[25]** As the instant application concerns a criminal cause or matter, the federal law which confers jurisdiction in such criminal cause or matter is to be found in s. 50(1). The substantive provisions enacted in art. 121(1B) and s. 50(1) do not contain any D provision which can be construed as conferring any "review jurisdiction" or "inherent powers" on the Court of Appeal.

[26] In examining the "review jurisdiction" of the Court of Appeal, it is significant to note that r. 137 empowers the Federal E Court "to hear any application". Rule 137 applies only to the Federal Court. It is not part of the Rules of the Court of Appeal 1994. Hence, the Federal Court judgments, which held that under r. 137 the Federal Court is conferred with "review jurisdiction", are of no assistance to the accused in the instant application.

F **[27]** Apparently, "inherent powers" and "review jurisdiction" emerged for the first time in the Court of Appeal in *Ramanathan Chelliah*, *supra*. There, the accused was convicted by the Sessions Court on two charges of outraging of modesty under s. 354 of the Penal Code. The accused appealed to the High Court. The High G Court held for the accused and quashed the conviction. The Public Prosecutor being dissatisfied with the acquittal appealed to the Court of Appeal. A differently constituted bench allowed the appeal and reinstated the conviction ("order of the first coram"). The accused then applied to set aside the order before another coram of H the Court of Appeal ("the second coram"). The second coram set aside the order of the first coram and gave certain directions. The second coram addressed two issues, the first of which is relevant. It is whether the second coram of the Court of Appeal has jurisdiction to review its earlier decision in an appeal heard and disposed of by I the first coram.

[28] In relation to "review jurisdiction", Gopal Sri Ram JCA (later FCJ) at p. 59 spoke for the court as follows: A

> It is now settled that the Court of Appeal has jurisdiction to review its own decision in a given case. See, *Taylor v. Lawrence* [2002] EWCA Civ 90, where it was held as follows: B
>
> > The Court of Appeal had a residual jurisdiction to reopen an appeal which it had already determined in order to avoid real injustice in exceptional circumstances. The court had implicit powers to do that which was necessary to achieve the dual objectives of an appellate court, namely to correct wrong decisions so as to ensure justice between the litigants involved, and to ensure public confidence in the administration of justice, not only by remedying wrong decisions, but also by clarifying and developing the law and setting precedents. A court had to have such powers in order to enforce its rules of practice, suppress any abuses of its process and defeat any attempted thwarting of its processes. The residual jurisdiction to reopen appeals was linked to a discretion which enabled the Court of Appeal to confine its use to the cases in which it was appropriate for the jurisdiction to be exercised. C D
>
> See also *Chu Tak Fai v. Public Prosecutor* [2006] 4 CLJ 931. E
>
> We are of the view that it is important to recognize that this court has a residual jurisdiction to reopen an appeal which it had already determined particularly in cases where there is no further recourse to a party. In a case as the present, since the accused was tried in a subordinate court, this court is the court of last resort. The jurisdiction to reopen and review is therefore important in a case as the present to ensure that a manifest injustice does not go by uncorrected. F

[29] The reasoning in the judgment in *Taylor v. Lawrence*, *supra*, is now reflected in the (English) CPR 52.17, which merits reproduction as follows: G

> The Application Of The Principles Of Taylor V Lawrence
>
> [4] CPR 52.17 is headed 'Reopening of final appeals'. Rule 52.17(1) provides: H
>
> > The Court of Appeal or the High Court will not reopen a final determination of any appeal unless - (a) it is necessary to do so in order to avoid real injustice; (b) the circumstances are exceptional and make it appropriate to reopen the appeal; and (c) there is no alternative effective remedy. I

[30] *Taylor v. Lawrence*, *supra*, was referred to in *Re Uddin*, *supra*, which was a renewed application for further consideration of the earlier refusal of the (English) Court of Appeal to grant permission to appeal. The Court of Appeal speaking through Dame Elizabeth Butler-Sloss P refused the renewed application.

[31] *Taylor v. Lawrence*, *supra*; and *Re Uddin*, *supra*, were discussed in *Abdullah Idris*, *supra*, where the Court of Appeal as the apex court has finally heard an appeal from the Sessions Court. The convicted person made an application by way of notice of motion in the same court, and sought an order that the Court of Appeal (by using its inherent powers under O. 92 r. 4 of the Rules of High Court 1980 ("O. 92 r. 4")) to set aside the earlier order of the Court of Appeal. In essence, James Foong JCA (now FCJ) delivering the judgment for the Court of Appeal held, *inter alia*, as follows:

(1) Rule 137 is similar to O. 92 r. 4 which applies *mutatis mutandis* to the Court of Appeal by virtue of r. 4 of the Rules of the Court of Appeal 1994. Rule 137 does not confer jurisdiction on the Federal Court to review its own decision.

(2) Notwithstanding that r. 137 does not confer any jurisdiction on the Federal Court, the court in very limited and exceptional cases, nevertheless has the inherent jurisdiction to review its own decision. Likewise, the Court of Appeal is seised with jurisdiction, not from O. 92 r. 4, but from a residual, implicit or implied form which makes no distinction between civil and criminal cases and within limited circumstances.

[32] In both *Abdullah Idris*, *supra,* and *Ramanathan Chelliah*, *supra*, the Court of Appeal invoked "the inherent, residual, implicit or implied jurisdiction" by following the common law rule enunciated in *Taylor v. Lawrence*, *supra*; and *Re Uddin*, *supra*.

[33] It is my respectful view that the judgments of the (English) Court of Appeal in *Taylor v. Lawrence*, *supra*, and *Re Uddin*, *supra*, were not concerned with the construction or interpretation of the statutory provisions enacted in our art. 121(1B), s. 50(1) and O. 92 r. 4.

[34] In Malaysia, the jurisdiction of the Court of Appeal is to be determined by reference to our own statutory provisions *viz* art. 121(1B), s. 50(1) and O. 92 r. 4. We do not have CPR 52.17. As different statutory provisions are called into question, the aforesaid two English cases are readily distinguishable. Likewise, *Abdullah Idris*, *supra*, and *Ramanathan Chelliah*, *supra*, which followed the two English judgments are also clearly distinguishable.

Rule 137 And O. 92 r. 4

[35] With the utmost respect, while r. 137 and O. 92 r. 4 are somewhat similar, they are not identical. Rule 4 of the Rules of the Court of Appeal 1994 has transplanted or supplanted O. 92 r. 4 into the 1994 Rules. Order 92 r. 4 merits reproduction as follows:

> For the removal of doubts it is hereby declared that nothing in these Rules shall be deemed to limit or affect the inherent powers of the Court to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the Court.

[36] The obvious difference between r. 137 and O. 92 r. 4 is that the words "to hear any application or" which appear in r. 137 are not to be found in O. 92 r. 4. In my view, these words in r. 137 are of critical importance. They empower the Federal Court to exercise the jurisdiction to hear any application, which had subsequently led to the enunciation of the "review jurisdiction" of the Federal Court ie, to review the earlier decision of another panel of the Federal Court with a view to setting it aside.

[37] In O. 92 r. 4, the exclusion of the words "to hear any application or" is not without significance. Such exclusion means that O. 92 r. 4 is not intended to empower the Court of Appeal to hear the type of application which the Federal Court has jurisdiction to hear under r. 137 and to invoke the "review jurisdiction". Order 92 r. 4 does not provide for the hearing of such an application to set aside an earlier order of the Court of Appeal. The "inherent powers" of the Court of Appeal "to make any order as may be necessary to prevent injustice" etc is only to be exercised by the Court of Appeal, if at all, in matters pertaining to practice and procedure and only in the same proceedings. The inherent powers of the Court of Appeal cannot be stretched to include the hearing of a subsequent application in order to invoke the "review jurisdiction" and to set aside an earlier decision of the Court of Appeal, as the word "review" has never been part of O. 92 r. 4.

A **Review Jurisdiction And Statute**

[38] As alluded to above, the word "review" does not appear at all in art. 121(1B), s. 50(1) and O. 92 r. 4. By way of contrast, the word "review" in the context of "judicial review" has been B expressly enacted in O. 53, in which case, the jurisdiction by way of judicial review is clear and unambiguous. The absence of the word "review" in art. 121(1B), s. 50(1) and O. 92 r. 4 means that no review jurisdiction has ever been conferred upon the Court of Appeal when it was created in 1994.

C **[39]** In *Stroud's Judicial Dictionary of Words and Phrases* (7th edn) (vol 3: P-Z) the word "review", where relevant, is explained as follows:

> Where a decision is to be reviewed, the reviewing body will D normally examine the lawfulness of the decision in question, as in the expression 'judicial review' or whether that decision is safe, or well-founded, as in the title of the Criminal Cases Review Commission. (*Kataria v. Essex Strategic Health Authority* [2004] 3 All ER 572 at 581, QBD per Stanley Burnton J.)

E **[40]** In *KJ Aiyer's Judicial Dictionary* (13th edn), the dictionary meaning of the word "review" is adopted in the following passages:

> According to the Chamber's Twentieth Century Dictionary the word 'review' is reconsideration and as verb it means to see or F examine again. According to the Webster's Seventh New Collegiate Dictionary, the word 'review' means renewed study of material previously studied. (*Roshanlal Poddar v. State* [1975] 79 Cal WN 816, 1975 CrLJ 1583).

> The term 'review' means a judicial re-examination of the case in G certain specified and prescribed circumstances. (*Gopinath Deb v. Budhia Swain* [1982] 54 Cut LT 515 (DB)).

> **Review is a statutory remedy** for reconsidering the order due to error apparent on the face of the record or due to discovery of some new and important evidence or any sufficient cause ... . H (emphasis added)

[41] Authorities abound to support the proposition that the conferment of "review jurisdiction" is not by way of inherent powers. "Review jurisdiction" must be expressly provided by statute. I Illustrations are found in:

(1) *Harbhajan Singh v. Karam Singh* AIR (53) [1966] SC 641: At p. 642 Ramaswami J held that the court's power to review must be given by statute.

(2) *Drew v. Willis* [1981] 1 QB 450: Lord Esher, MR pointed out that no court has a power of setting aside an order which has been properly made, unless it is given by statute.

(3) *Anantharaju Shetty v. Appu Hegade*, AIR [1919] Mad 244: Seshagiri Aiyar, J of the Madras High Court observed:

> It is settled law that a case is not open to appeal unless the statute gives such a right. The power to review must also be given by statute. *Prima facie* a party who has obtained a decision is entitled to keep it unassailed, unless the Legislature had indicated the mode by which it can be set aside. A review is practically the hearing of an appeal by the same officer who decided the case. There is at least good reason for saying that such power should not be exercised unless the statute gives it, ...

(4) *Trilok Singh v. State Transport Authority*, Bihar AIR [1985] Patna 87: At p. 88, Ashwini Kumar Sinha J said that it is well settled that the power of review is not an inherent power but is created by statute and expressly conferred by the statute. The power of review has always been held to be a creature of statute.

(5) *Fernandes v. Ranganayakulu* AIR [1953] Mad 236: At p. 237 Ramaswami J echoed the same sentiment when he said that so far as the invocation of the inherent powers of court is concerned, it has been held repeatedly and has now become well settled law that the power to review is not an inherent power of a judicial officer but such a right must be conferred by statute.

Finality

[42] It is in the interest of the state and the public that there is finality in litigation. In *Venkata Narasimha Appa Row v. The Court of Wards & Ors* [1886] 11 AC 660, in delivering his speech in the House of Lords, Lord Watson said at p. 664:

> There is a salutary maxim which ought to be observed by all Courts of last resort - *Interest reipublicae ut sit finis litium*. Its strict observance may occasionally entail hardship upon individual litigants,

A but the mischief arising from that source must be small in comparison with the great mischief which would necessarily result from doubt being thrown upon the finality of the decisions of such a tribunal as this.

Conclusion

B

[43] On the foregoing grounds, I am of the view that there is substance in the prosecution's preliminary objection. I therefore hold that this court has no jurisdiction to hear the notice of motion. My answer to the aforesaid question is in the negative. The instant C application is dismissed *in limine*.

Hishamudin Mohd Yunus JCA:

[44] By notice of motion the respondent (Ishak bin Hj Shaari) applies to this court to exercise it powers of review to review a D decision of the Court of Appeal dated 13 October 2008.

[45] On 13 October 2008 the Court of Appeal had allowed the public prosecutor's appeal against the decision of the High Court of Seremban of 26 January 2005.

E

[46] Earlier, what had happened was, on 27 January 2000 the Sessions Court of Seremban had convicted the respondent on the offence of rape of a minor under s. 376 of the Penal Code and had sentenced him to 15 years' imprisonment and five strokes of F whipping. He appealed to the High Court of Seremban. On 26 January 2005 the High Court of Seremban allowed his appeal and set aside the conviction and sentence.

[47] Dissatisfied with the decision of the High Court, the public prosecutor appealed to the Court of Appeal. On 13 October 2008 G the Court of Appeal allowed the public prosecutor's appeal and set aside the order of the High Court, and restored the conviction recorded by the Sessions Court as well as the sentence imposed by the said court. In our legal system, as the appeal emanates from a judgment of a subordinate court (in the present case, a Sessions H Court) there is no further recourse to the Federal Court. In other words, for this particular judgment of the High Court of Seremban, should any party be aggrieved by the judgment, the Court of Appeal is the court of last resort.

I

[48] In applying to this court to exercise its power of review to review the earlier decision of this court, Encik Karpal Singh, the learned counsel for the applicant/respondent, contends that the decision of the Court of Appeal of 13 October 2008, in allowing the public prosecutor's appeal, had failed to give due consideration to certain evidence, and hence a miscarriage of justice had been occasioned by that decision.

[49] At the commencement of the hearing of this motion, the learned deputy public prosecutor, Encik Awang Armadajaya, raises a preliminary objection and that is that a Court of Appeal has no jurisdiction or power to review its own previous decision. The learned DPP relied mainly on the judgment of Mohd Ghazali Yusoff FCJ in the recent Federal Court case of *Dato' Seri Anwar Ibrahim v. PP* [2010] 7 CLJ 397.

[50] The learned DPP also refers to art. 121 of the Federal Constitution and s. 50 of the Courts of Judicature Act 1964 and argues that there is nothing in either art. 121 or s. 50 that specifically confers on the Court of Appeal any inherent power to review its own previous decision.

[51] It has been agreed by the parties that this court shall at this stage of the hearing of the motion only confine itself to hearing the preliminary objection of the public prosecutor, and shall make a ruling solely on the issue raised in the preliminary objection. In the event this court were to rule on the preliminary objection in favour of the public prosecutor (in other words in the event that this court were to uphold the preliminary objection) then this court will proceed to dismiss the notice of motion. On the other hand, in the event the preliminary objection is dismissed, then this court will proceed to hear the substantive motion of the applicant on its merits.

[52] Now, having had the benefit of considering the submissions of the applicant and the respondent, both written and oral, I am dismissing this preliminary objection, and I shall now proceed to give my grounds.

[53] There have already been two previous judgments of the Court of Appeal that ruled that the Court of Appeal has the inherent power to review its own previous decision under exceptional circumstances in order to prevent an injustice being occasioned or

to prevent an abuse of the process of the court, particularly where the previous decision was made by the Court of Appeal sitting as a court of last resort. They are:

(1) *Ramanathan Chelliah v. PP* [2009] 6 CLJ 55; and

(2) *PP v. Abdullah Idris* [2009] 5 CLJ 445.

[54] In *Ramanathan* members of the panel were Gopal Sri Ram JCA (as he then was), Hasan Lah JCA and Jeffrey Tan JCA. Gopal Sri Ram JCA, in delivering the unanimous judgment of the court, said (at p. 59):

> [2] We will take the question of jurisdiction first. It is now settled that the Court of Appeal has jurisdiction to review its own decision in a given case. See, *Taylor v. Lawrence* [2002] EWCA Civ 90, where it was held as follows:
>
> > The Court of Appeal had a residual jurisdiction to reopen an appeal which it had already determined in order to avoid real injustice in exceptional circumstances. The court had implicit powers to do that which was necessary to achieve the dual objectives of an appellate court, namely to correct wrong decisions so as to ensure justice between the litigants involved, and to ensure public confidence in the administration of justice, not only by remedying wrong decisions, but also by clarifying and developing the law and setting precedents. A court had to have such powers in order to enforce its rule of practice, suppress any abuses of its process and defeat any attempted thwarting of its process. The residual jurisdiction to reopen appeals was linked to a discretion which enabled the Court of Appeal to confine its use to the cases in which it was appropriate for the jurisdiction to be exercised.

See also *Chu Tak Fai v. Public Prosecutor* [2006] 4 CLJ 931.

[55] In *Abdullah Idris* it was a panel of three judges comprising James Foong JCA (as he then was), Hassan Lah JCA and Sulong Matjeraie JCA. In the course of delivering the unanimous judgment of the court, James Foong JCA posed the following pertinent question:

> If r. 137 of the Rules of the Federal Court which is, and I repeat, similar to O. 92 r. 4 of the Rules of the High Court which applies *mutatis mutandis* to the Court of Appeal by virtue of r. 4 of the Rules of the Court of Appeal, cannot confer jurisdiction on the

Federal Court how then did the Federal Court in the case of *Asean Security Paper Mills Sdn Bhd v. Mitsui Sumitomo Insurance (Malaysia) Bhd* [2008] 6 CLJ 1 derive jurisdiction to entertain a review of its own decision? Similar to the Court of Appeal, except for r. 137 the Rules of the Federal Court, there is no provision in the Federal Constitution, the Court of Judicature Act or any Federal Law conferring jurisdiction on the Federal Court to review its own decision.

[56] The learned judge then referred to certain passages of the judgments of Abdul Hamid Mohamad CJ and Zaki Tun Azmi PCA (as he then was) in the Federal Court case of *Asean Security Paper Mills Sdn Bhd v. Mitsui Sumitomo Insurance (Malaysia) Bhd* [2008] 6 CLJ 1 to explain how the Federal Court derives its inherent power to review its previous decision. That part of the judgment of James Foong JCA reads as follows (at p. 457-458):

In *Asean Security Paper Mills Sdn Bhd v. Mitsui Sumitomo Insurance (Malaysia) Bhd (supra)*, an application was made to the Federal Court to have a decision of the Federal Court reviewed and reheard pursuant to r. 137 of the Rules of the Federal Court to prevent injustice or to prevent an abuse of the process of the court. Though Chief Justice Abdul Hamid Mohamad in that case initially reiterated that r. 137 of the Rules of the Federal Court does not confer jurisdiction, he conceded:

> However, I accept that, in very limited and exceptional cases, this court does have the inherent jurisdiction to review its own decision. I must stress again that this jurisdiction is very limited in its scope and must not be abused. I have no difficulty in accepting **that inherent jurisdiction** may be exercised in the following instances: … (emphasis added).

Another member of the panel in same case, Justice Zaki Tun Azmi PCA (as he then was) though agreeing with the views of the Chief Justice that r. 137 of the Rules of the Federal Court confers no jurisdiction on the Federal Court to review or rehear its own case **but since it is part of the court's power to do all things reasonably necessary to ensure fair administration of justice within its jurisdiction** subject to valid existing laws including the Constitution then "that inherent power is found within the very nature of a court of law, unlike power conferred by statute" (emphasis added). But he cautioned:

> There is no doubt that this court has that authority to allow this application. Whether it does so, depends on the circumstances of each case. This court has on many previous

A occasions decided that it has the right to order a review of its own decision to prevent injustice or an abuse of the process of the court. It has that very wide discretion. However, that wide discretion will not be used liberally but only sparingly, in exceptional cases and on a case to case basis where a significant injustice had probably occurred and there was no alternative effective remedy. The court must exercise strong control over such application. It must be satisfied that it is within exceptional category. (emphasis added).

C **[57]** Having referred to the above passages of the judgments of Abdul Hamid Mohamad CJ and Zaki Tun Azmi PCA in *Asean Security Paper Mills*, James Foong JCA then put the question (at p. 458):

D If the Federal Court is possessed of such inherent power to review or rehear a matter that it has previously disposed off, what about the intermediary level of the Court of Appeal on a matter that cannot be taken further to the Federal Court?

[58] Having posed the above question, the court then referred to E the English Court of Appeal case of *Taylor v. Lawrence* [2002] 2 All ER 353 where Lord Woolf CJ ruled that the Court of Appeal has residual jurisdiction to reopen an appeal which it had already determined in order to avoid real injustice in exceptional circumstances. James Foong JCA also referred to the English Court F of Appeal case of *Re Uddin (A Child) (Serious Injury: Standard Of Proof)* [2005] 3 All ER 550.

[59] Having referred to these two English cases, James Foong JCA proceeded to make the following ruling (at pp. 459-460):

G [34] When a court is armed with 'residual jurisdiction' or 'implicit or implied jurisdiction' or 'inherent jurisdiction' for 'the doing by the courts of acts which it needs must have power to do in order to maintain its character as a court of justice' then I am of the view that the Court of Appeal is seized with H jurisdiction, not from O. 92 r. 4 of the Rules of High Court but from a residual or implicit or implied form which naturally makes no distinction between civil and criminal cases. Such inherent power applies across the board save and except within the limited circumstances as forewarned by the authorities cited above.

I

[60] However, at a later part of the judgment, the court, as a matter of prudence, did caution itself (at p. 461): A

> [38] Aside from these particular guidelines, I must add that this court, as a court of finality for cases originating from the subordinate courts, must always bear in mind that only in exceptional and limited circumstances that such application be allowed otherwise it will open the floodgate for cases that had already been decided to be re-litigated. This would defeat the principle of finality in a case. Thus, when considering an application of this sort, I must echo the approach voiced by Justice Zaki Tun Azmi PCA (as he then was) that it should not 'be used liberally but only sparingly, in exceptional cases and on a case to case basis where significant injustice had probably occurred and there was no alternative effective remedy'. B C

[61] Encik Awang Armadajaya, however, either in his written submission or his oral submission before this court, did not refer to any of these two cases (*Ramanathan* and *Abdullah Idris*). At the conclusion of his oral submission, when I asked him to comment on these two cases, he merely urged this court to depart from these decisions. Can this court as the Court of Appeal depart from its previous decisions? It is unfortunate that the parties before this court, in the course of submissions, have not addressed this issue. As I understand the law, this court, being the Court of Appeal, in civil cases, is bound by its own previous decisions (see *Young v. Bristol Aeroplane Co Ltd* [1944] 2 All ER 293; *PM Hendry v. George John de Cruz* [1948] 1 LNS 39; and *Kwong Yik Bank Bhd v. Ansonia Management Associates Sdn Bhd* [1999] 1 CLJ 337). But there are exceptions, as spelt out by the United Kingdom Court of Appeal in *Young v. Bristol Aeroplane*, and they being: D E F

(a) where its own previous decisions conflict, the Court of Appeal must decide which to follow and which to reject; G

(b) the Court of Appeal must refuse to follow a decision of its own which cannot stand with a decision of the Federal Court even though its decision has not been expressly overruled by the Federal Court; and H

(c) the Court of Appeal need not follow a decision of its own if satisfied that it was given *per incuriam*.

I

[62] In criminal matters, however, because a person's liberty may be at stake, the Court of Appeal, apart from situations (a), (b) and (c) above, may also depart from its own previous decision if satisfied that the law was misapplied or misunderstood in the previous decision. That the position in the criminal jurisdiction of the Court of Appeal should be different from that in the civil is derived from the judgment of Diplock LJ in *R v. Gould* [1968] 2 QB 65, 68-89. The relevant passage reads as follows:

> In its criminal jurisdiction, which it has inherited from the Court of Criminal Appeal, the Court of Appeal does not apply the doctrine of *stare decisis* with the same rigidity as its civil jurisdiction. If upon due consideration we were to be of opinion that the law had been either misapplied or misunderstood in an earlier decision of this court or its predecessor, the Court of Criminal Appeal, we should be entitled to depart from the view as to the law expressed in the earlier decision notwithstanding that the case could not be brought within any of the exceptions laid down in *Young v. Bristol Aeroplane Co Ltd* [1944] KB 718 as justifying the Court of Appeal in refusing to follow one of its decision in a civil case (*R v. Taylor* [1950] 2 KB 368). A *fortiori*, we are bound to give effect to the law as we think it is if the previous decision to the contrary effect is one of which the *ratio decidendi* conflicts with that of other decisions of this court or its predecessor of co-ordinate jurisdiction.

[63] In the case that is now before this court, Encik Awang Armadajaya has not convinced me that based on the exceptions as laid out in *Young v. Bristol Aeroplane* and *R v. Gould*, I have a good and valid reason not to follow the decisions of this court in *Ramanathan* and *Abdullah Idris*. Hence, this court is bound by its previous decisions in *Ramanathan* and *Abdullah Idris*.

[64] Now, coming to the case of *Dato' Seri Anwar Ibrahim*, relied upon by the learned DPP, at the outset it must be noted that this case does not directly concern the inherent powers or jurisdiction of the Court of Appeal. Instead it directly concerns the inherent powers or jurisdiction of the Federal Court to review its own previous decision. The judgment of Mohd Ghazali Yusoff FCJ in Dato' Seri Anwar Ibrahim that is being relied upon by Encik Awang Armadajaya, the learned DPP, in support of his preliminary objection, although not a dissenting, is only a minority judgment. The learned judge had ruled that the Federal Court has no inherent power to review its own previous decision. In the words of the learned judge (at p. 447):

> [88] It is clear that this court has not been conferred any statutory right to review its own decision. It is also clear that this court has no inherent power to review its own decision. The decision of this court on 29 January 2010 was final. The interpretation both on facts and law in that decision, whether it was correct or otherwise, are matters of opinion of that panel of this court. It cannot subsequently be reviewed, reheard, reopened or relitigated before another panel of this court.

[65] Encik Awang Armadajaya contends that this judgment of Mohd Ghazali Yusoff FCJ is authority for the proposition that the Federal Court has no power or jurisdiction to review its own previous decision under any circumstances whatsoever. The learned DPP then argues that if the Federal Court does not have the inherent powers to review its own decision, in spite of the fact that there is r. 137 of the Rules of the Federal Court 1995, a *fortiori*, the Court of Appeal too does not have the power to review its own previous decision. The Rules of the Court of Appeal 1994 does not have a provision similar to r. 137 of the Rules of the Federal Court, but the Rules of the Court of Appeal have r. 4 which empowers the Court of Appeal to apply the procedure and practice in the Rules of the High Court 1980, and in the context of the issue at hand O. 92 r. 4 of the Rules of the High Court is significant.

[66] With respect, in considering the argument of Encik Awang Armadajaya, it is of importance for me to stress here that the view of Mohd Ghazali Yusoff FCJ is not shared by the other two members of the panel, namely, Zulkefli Makinudin FCJ and Heliliah Mohd Yusof FCJ. Both Zulkefli Makinudin FCJ and Heliliah Mohd Yusof FCJ, in their judgments, take the contrary position. They take the position that the Federal Court has the inherent powers or jurisdiction in exceptional circumstances to review its own previous decision where it is necessary to do so in order to prevent an injustice being occasioned or in order to prevent an abuse of the court process. Zulkefli Makinudin FCJ, in his judgment, said (at p. 405):

> [2] I am of the view r. 137 cannot be construed as conferring upon the Federal Court the statutory jurisdiction or the new jurisdiction to hear any application to review its own decision. However, under r. 137 the Federal Court still has the limited 'inherent power' or 'inherent jurisdiction' in

A order to maintain its character as a court of justice to hear any application or to make any order to prevent injustice or to prevent an abuse of the process of the court. There is an important difference between the nature of the inherent jurisdiction of the court and its
B statutory jurisdiction. The source of the statutory jurisdiction of the court is the statute itself which will define the limits within which such jurisdiction is to be exercised, whereas the source of the inherent jurisdiction of the court is derived from its nature as a court of law and that the limits of such jurisdiction are not easy to
C define. (See Sir Jack Jacob, QC 'The Inherent Jurisdiction of the Court' (1970) Current Legal Problems 23).

And Heliliah Mohd Yusof FCJ in her judgment said (at p. 488):

D [148] The rule itself is being framed as a deeming provision. The words '... nothing shall be deemed to limit or affect' means also nothing in the rules shall be regarded as limiting or affecting the inherent powers of the court. The 'court' of course is a reference to the Federal Court. The
E SG seems troubled by the source of the power. Is the deeming provision a legal fiction or statutory hypothesis. The term 'inherent powers' refers to the judicial powers of the Federal Court itself. 'Inherent' means it is intrinsic or organic to the judicial powers of the Federal Court and hence being so the Federal Court draws upon it in the
F limited circumstances prescribed in r. 137 namely to address injustice or abuse of processes. A certain reserve of powers intrinsically remains with the court for the simple reason that the Federal Court is created by the constitution as a judicial organ at the apex of the judiciary. Hence by virtue of being at the apex it is only the Federal
G Court (and no other non judicial branch) that has to be the organ to deal with 'injustice' or 'abuse of processes'. It is in that limited sense that the jurisdiction itself stems from the inherent powers, for the powers being intrinsic and organic to the judicial powers of the Federal Court, those
H powers may therefore be drawn upon as and when circumstances require. It therefore constitutes a separate exercise and more of a rectifying process. The exercise of that inherent power will only be triggered by an application made to it, upon which the court could said to become seised of it. In that sense it could be said to exercise an
I inherent jurisdiction.

[67] It hardly need stating here that I am bound by the majority judgment in *Dato' Seri Anwar Ibrahim* rather than by the minority judgment of Mohd Ghazali Yusoff FCJ.

[68] The learned DPP, Encik Awang Armadajaya, also submits that the prosecution had raised a similar preliminary objection in two other cases recently, where an application for a review of a previous decision by the accused person was made, the first case being an application before the Court of Appeal and the other before the Federal Court. The Court of Appeal case is that of *Azlan Alias v. PP*, Court of Appeal Criminal Application No. D-09-22-04, whilst the Federal Court case is that of *Abdul Razak Dalek v. PP* [2010] 6 CLJ 357, Federal Court Criminal Application No. 05-84-2009 (J). According to the learned DPP, in these two cases the preliminary objection of the prosecution was upheld by the court. But according to Encik Awang Armadajaya, hitherto, there has been no written judgment issued in respect of any of the two cases. With respect, since there have been no written judgments, I am unable to accord any judicial significance to these two cases cited by the learned DPP.

[69] I must also add that the majority judgment in *Dato' Seri Anwar Ibrahim* is consistent with a long line of precedents, namely, the following Federal Court judgments:

(1) *Chia Yan Tek & Anor v. Ng Swee Kiat & Anor* [2001] 4 CLJ 61;

(2) *Megat Najmuddin Dato Seri (Dr) Megat Khas v. Bank Bumiputra (Malaysia) Bhd* [2002] 1 CLJ 645;

(3) *MGG Pillai v. Tan Sri Dato' Vincent Tan Chee Yioun* [2002] 3 CLJ 577;

(4) *Dato' Seri Anwar Ibrahim v. PP* [2004] 4 CLJ 157;

(5) *Allied Capital Sdn Bhd v. Mohd Latiff Shah Mohd & Another Application* [2004] 4 CLJ 350;

(6) *Adorna Properties Sdn Bhd v. Kobchai Sosothikul* [2005] 1 CLJ 565;

(7) *Chan Yock Cher v. Chan Teong Peng* [2004] 4 CLJ 533;

A (8) *Chu Tak Fai v. PP* [2006] 4 CLJ 931;

(9) *Asean Security Paper Mills Sdn Bhd v. Mitsui Sumitomo Insurance (Malaysia) Bhd* [2008] 6 CLJ 1; and

B (10) *Badan Peguam Malaysia v. Kerajaan Malaysia* [2009] 1 CLJ 833;

[70] In *Asean Security Paper Mills* Abdul Hamid Mohamad CJ gave five examples of situations in which the court may exercise its power of review. But it is important to note that his lordship also C said:

> Of course, there may be other circumstances.

[71] In some of the cases cited above, the Federal Court, having ruled that it had the inherent power to review a previous decision D of the court in exceptional circumstances to prevent injustice and to prevent an abuse of the process of the court, nonetheless, having considered the facts of the particular application before it, proceeded to rule that the application had no merit and accordingly dismissed the application. But the judgments made it clear that the issue as E to whether the Federal Court has the inherent power to review its own previous decision and the issue as to whether on the particular facts before it, the Federal Court ought to exercise its power of review in favour of the applicant are two separate issues. Needless to say, these two questions must be dealt with and considered F separately in order to avoid any confusion.

[72] In *Asean Security Paper Mills* Abdul Hamid Mohamed CJ and Zaki Tun Azmi PCA took pains to explain that the inherent powers of the Federal Court to review its own previous decisions are not G derived from r. 137 of the Rules of the Federal Court.

[73] In addition there is the Federal Court of India case of *Raja Prithwi Chand v. Sukhraj Rai* AIR 1941 which ruled:

H > The Federal Court will not sit as a Court of Appeal from its own decisions, nor will it entertain applications to review on the ground only that one of the parties in the case conceives himself to be aggrieved by the decision. The rules which govern the practice of the Judicial Committee and of the House of Lords in matters of review govern the practice of the Federal Court as well in India. I Consequently no case in the Federal Court can be re-heard and an

order once made is final and cannot be altered. Nevertheless, in exceptional circumstances, an application for review can be entertained. The Federal Court will exercise its power of review for the purpose of rectifying mistakes which have crept in by misprision in embodying the judgments, or have been introduced through inadvertence in the details of the judgment. It can also supply manifest defects in order to enable the decrees to be enforced, or add explanatory matter, or reconcile inconsistencies. The indulgence by way of review is granted mainly owing to the natural desire to prevent irremedial injustice being done by a Court of last resort as where by some accident, without any blame, the party has not been heard. But in no case however can a re-hearing be allowed upon the merits or even on the ground that new matter has been discovered, which, if it had been produced at the hearing of the appeal, might materially have affected the judgment of the Court: [1886] 11 AC 660; [1836] 1 Moo PC 117; [1871] LR 3 PC 664 and 14 Mad 439 (PC), Rel. on.

[74] The above judgment of the Federal Court of India has been cited with approval by our Federal Court in *Chu Tak Fai*.

[75] In conclusion, based on local and foreign authorities, I am of the view that the Federal Court and the Court of Appeal have the inherent jurisdiction or powers to review their own previous decisions in exceptional circumstances where the court is satisfied that it is necessary to do so in order to prevent an injustice being occasioned by the previous decision or to prevent an abuse of the process of the court, particularly when that previous decision was made by the Court of Appeal sitting as a court of last resort. The minority judgment of Mohd Ghazali Yusoff FCJ in *Dato' Seri Anwar Ibrahim* is, with respect, against clear, abundant and established judicial precedents. And I wish to add that the source of these inherent powers, as explained by Abdul Hamid Mohamad CJ and Zaki Tun Azmi PCA in *Asean Security Paper Mills*, and by James Foong JCA in *Abdullah Idris*, is neither r. 137 of the Rules of the Federal Court nor r. 4 of the Rules of the Court of Appeal read with O. 92 r. 4 of the Rules of the High Court. As correctly explained by the Chief Justice of the Federal Court and the President of the Court of Appeal in *Asean Security Paper Mills*, r. 137 merely confirms or recognizes the existence of the inherent powers of the Federal Court: the rule does not create or confer the inherent powers; it merely serves as a reminder of the existence of inherent powers that are already there in the first place. The source of the

A inherent powers is the judicial power that is vested on the judiciary by the Federal Constitution, in particular, art. 121. These inherent powers are powers that the courts must have in order to dispense justice effectively and the limits of these inherent powers, as noted by Zulkefli Makinudin FCJ in *Dato' Seri Anwar Ibrahim*, B are difficult to define and, indeed, I venture to say that the limits of these inherent powers can never ever be precisely determined either by the courts or by Parliament. And in this regard I must reject the suggestion by the learned DPP that art. 121 of the Federal Constitution read with s. 50 of the Courts of Judicature C Act limits the inherent powers of the Federal Court and the Court of Appeal, or that the art. 121 read with s. 50 does not confer any inherent powers on the courts to review their previous decisions. Indeed, it is clear to me that neither art. 121 nor s. 50 diminishes the inherent powers either of the Federal Court or of D the Court of Appeal. Article 121 confers the judicial power on the courts, and the courts in exercising that judicial power must of necessity have the inherent powers so that justice could be mete out effectively and in a meaningful manner.

E **[76]** Accordingly, I am dismissing the deputy public prosecutor's preliminary objection, and I shall now invite Encik Karpal Singh to submit on the merits of the respondent's application.

[Preliminary objection dismissed; hearing to proceed on the F substantive application]

Zaharah Ibrahim JCA:

[77] The applicant's application to this court in encl. 27a is for an order that this court uses its "inherent power" and sets aside the G order of the Court of Appeal given on 13 October 2008, allowing the public prosecutor's appeal against the decision of the High Court in Malaya at Seremban in Criminal Appeal No. 42-7-2000. In that appeal, the Court of Appeal restored the decision of the Sessions Court which convicted the applicant and sentenced him to H imprisonment for a term of 15 years from 13 October 2008 and five strokes of whipping.

I

The Preliminary Objection

[78] At the outset, the public prosecutor, through Deputy Public Prosecutor Awang Armadajaya Awang Mahmud (DPP Awang Armadajaya), raised a preliminary objection that this court has no jurisdiction and consequently no power to review its own earlier decision, much less to set it aside.

[79] We indicated that we would first deal with the jurisdictional issue raised in the preliminary objection. The actual application will only be heard if we find that we do have the necessary jurisdiction to hear it.

The Submissions

[80] Mr Karpal Singh, the learned counsel for the applicant, submitted that this court has the jurisdiction to review its own earlier decision. Reliance was placed on the Court of Appeal cases of *Ramanathan Chelliah v. PP* [2009] 6 CLJ 55 ("*Ramanathan*'s case") and in *PP v. Abdullah Idris* [2009] 5 CLJ 445. ("*Abdullah Idris*' case")

[81] Mr Karpal also relied on the Federal Court case of *Chu Tak Fai v. PP* [2006] 4 CLJ 931, as well as the cases of *Asean Security Paper Mills Sdn Bhd v. Mitsui Sumitomo Insurance (Malaysia) Bhd* [2008] 6 CLJ 1 and *Badan Peguam Malaysia v. Kerajaan Malaysia* [2009] 1 CLJ 833, all of which were referred to in the case of *Dato' Seri Anwar Ibrahim v. PP* [2010] 7 CLJ 397 ("*Dato' Seri Anwar*'s case").

[82] Mr Karpal conceded that O. 92 r. 4 of the Rules of the High Court 1980 (which is made applicable, *mutatis mutandis*, to the Court of Appeal by r. 4 of the Rules of the Court of Appeal 1994) does not confer upon the Court of Appeal the jurisdiction to review its own decision. It appears therefore that the applicant is not relying on O. 92 r. 4 for this application.

[83] For the public prosecutor, DPP Awang Armadajaya submitted that the court ought to follow the decision of Mohd Ghazali Mohd Yusoff, FCJ, in *Dato' Seri Anwar*'s case.

[84] According to DPP Awang Armadajaya, that decision was subsequently followed in the Federal Court case (in which DPP Awang Armadajaya represented the public prosecutor) involving the

application of one Abdul Razak bin Dalek ("Abdul Razak Dalek's application") for the review of an earlier Federal Court decision affirming his conviction and sentence for murder.

[85] Unfortunately, the judgement in Abdul Razak Dalek's application is not available to us. However, it appears from the news report published in the newspaper the Sun on 12 August 2010 (a copy of which is found in the applicant's bundle of authorities) that Abdul Razak Dalek's application was dismissed by the Federal Court upon a preliminary objection being raised by DPP Awang Armadajaya for the public prosecutor that the Federal Court has no jurisdiction to hear the review application.

The Issue

[86] The present Court of Appeal was created in 1994 to be an intermediate superior court between the High Court and the Federal Court.

[87] For cases decided by the High Court in its original jurisdiction, the Court of Appeal is a first tier appeal court. For cases decided by the High Court in its appellate jurisdiction it is a second tier and final tier appeal court. The Federal Court, according to ss. 87 and 96 of the Courts of Judicature Act 1964 ("the CJA"), is only conferred jurisdiction to hear appeals from decisions of the Court of Appeal in its appellate jurisdiction in respect of a matter decided by the High Court in its original jurisdiction.

[88] It is in the context of the Court of Appeal being the final tier appellate court for cases originating from the Sessions Court that this application was made. The rationale for this application by the applicant is that since the decision of the Court of Appeal on his substantive appeal earlier cannot be appealed against to the Federal Court, the only way for the applicant to have what he alleges to be an error committed by the Court of Appeal in that earlier decision corrected is to have the case reviewed and the earlier decision set aside. In other words, the applicant has no other recourse and no alternative remedy.

[89] The sole issue for determination at this stage is therefore whether the Court of Appeal has the jurisdiction to review its earlier decision made after hearing the parties in the appeal before it.

Jurisdiction Of The Court Of Appeal

[90] Article 121 cl. (1B) of the Federal Constitution, by which the Court of Appeal was created, is as follows:

> (1B) There shall be a court which shall be known as the Mahkamah Rayuan (Court of Appeal) and shall have its principal registry at such place as the Yang di-Pertuan Agong may determine, and the Court of Appeal shall have the following jurisdiction, that is to say:
>
> (a) jurisdiction to determine appeals from decisions of a High Court or a judge thereof (except decisions of a High Court given by a registrar or other officer of the Court and appealable under federal law to a judge of the Court); and
>
> (b) such other jurisdiction as may be conferred by or under federal law.

[91] The CJA sets out in detail the limits of the jurisdiction conferred on the Court of Appeal. For criminal cases, sub-s. 50(1) of the CJA confers upon it the jurisdiction to hear and determine any appeal against any decision made by the High Court in the exercise of its original jurisdiction or in the exercise of its appellate or revisionary jurisdiction in respect of matters decided by the Sessions Court or, with the leave of the Court of Appeal, in respect of matters decided by a magistrate's court.

[92] It is not in dispute that nothing in s. 50 of the CJA, or in any other provisions of the CJA, or in any other federal law, or in any subsidiary legislation made under a federal law, confers upon the Court of Appeal the jurisdiction to review any matter which it has heard and finally determined, except in the circumstances set out in ss. 42 and 44 of the CJA.

[93] In *Lye Thai Sang & Anor v. Faber Merlin (M) Sdn Bhd & Ors & Another Case* [1985] 2 CLJ 423; [1985] CLJ (Rep) 196 the Supreme Court held that where:

> ... a final decision has been delivered, an appeal is in effect heard and disposed of. In other words, it has been brought to a final conclusion. And that being the case, the Supreme Court has no power to re-open, re-hear and re-examine its decision for whatever purpose. The only exception where there can be a re-hearing is only to the extent provided by section 42, in particular subsection

A (3) of section 42. The other exception is as provided under section 44 sub-section (3) to the effect that every order such as that envisaged in sub-section (1) of section 44 may be discharged or varied by the full Court.

B **[94]** Upon the creation of the Court of Appeal, the same s. 42 and s. 44 of the CJA were made applicable to it (with a new Part IV being created in the CJA to deal with the jurisdiction, powers and matters relating to the Federal Court).

[95] Subsection 42(3) of the CJA has since been repealed.
C However, sub-s. 42(2) still provides for the re-hearing of an appeal in cases where a matter is not determined by a majority of judges of the Court of Appeal.

[96] The case of *Lye Thai Sang* implies that since the CJA only
D provides for those two instances where the court may revisit its earlier decision, it is not the intention of the legislature that the court should be allowed to re-open or re-visit its earlier decisions in any other case.

E **[97]** If the Court of Appeal does not have statutory jurisdiction to review its earlier decisions, does it have an "inherent jurisdiction" to do so?

"Inherent Jurisdiction"

F **[98]** In *Ramanathan*'s case and in *Abdullah Idris*' case the decision of the English Court of Appeal in *Taylor And Another v. Lawrence And Another* [2002] All ER 353 ("*Taylor v. Lawrence*") was referred to and followed.

G **[99]** In *Taylor v. Lawrence*, Lord Woolf CJ said that the Court of Appeal was:

> ... established with two principal objectives. The first is a private objective of correcting wrong decisions so as to ensure justice between the litigants involved. The second is a public objective, to
H ensure public confidence in the administration of justice not only by remedying wrong decisions but also by clarifying and developing the law and setting precedents.

I

[100] His Lordship then went on to say that the Court of Appeal was established with the broad jurisdiction to hear appeals. It was not established to exercise an originating as opposed to an appellate jurisdiction. "It is therefore appropriate to state that in that sense it has no inherent jurisdiction. It is, however, wrong to say that it has no implicit or implied jurisdiction arising out of the fact that it is an appellate court. As an appellate court it has the implicit power to do that which is necessary to achieve the dual objectives of an appellate court" which he had referred to earlier.

[101] In *Ramanathan*'s case, an earlier decision of the Court of Appeal was reviewed and set aside (and the original appeal ordered to be re-heard before another panel) based on the "residual jurisdiction" or "implied jurisdiction" that Lord Woolf refers to in *Taylor v. Lawrence*.

[102] Does the Court of Appeal have any inherent or residual jurisdiction to review and set aside its earlier decisions?

[103] Under the Federation of Malaya Agreement 1948, the Supreme Court of the Federation of Malaya (consisting of the High Court and Court of Appeal) was granted "unlimited civil and criminal jurisdiction". Upon Independence, the Supreme Court of the 1948 Federation of Malaya ("pre-Independence Supreme Court") continued, under art. 121 of the Federal Constitution, as the Supreme Court of the independent Federation of Malaya by virtue of the art. 172 of the Federal Constitution. Article 172 was repealed in 1963, but without prejudice to the continuation of the courts referred to in that article.

[104] Article 121 cl. (1) of the Federal Constitution vested judicial power of the Federation in the Supreme Court of Malaya. However, on Malaysia Day, art. 121 cl. (1) was amended and judicial power remained vested only in the High Courts. The Federal Court had only the jurisdiction that was set out in art. 121 cl. (2). In 1988, even the words "judicial power" had been deleted from art. 121 cl. (1). The words "judicial power" however remained in the marginal note to that article, and subsequently when the Federal Constitution was reprinted, the current version has those words in the shoulder note to that article. A discussion on the implication of the presence of those words in the shoulder note of art. 121 is found in the judgement of Heliliah Mohd Yusof, FCJ, in *Dato' Seri Anwar*'s case.

[105] It could perhaps be argued that the High Courts and the Federal Court could draw upon their historical jurisdiction referred to above as a basis for claiming the existence of an "inherent" or a "residual" jurisdiction. That same argument cannot possibly apply to the Court of Appeal which was only created in 1994.

[106] Even in the case of the pre-Independence Supreme Court, His Lordship Thomson CJ in the case of *Lee Lee Cheng (f) v. Seow Peng Kwang* [1960] MLJ 1, at p. 3, concluded that since cl. 77 of the Federation of Malaya Agreement 1948, which granted the court "unlimited jurisdiction", also provided that its constitution, powers and procedure may be prescribed by Federal Ordinance, the words "unlimited jurisdiction" merely mean "that there is authority to exercise such judicial power as is given by law in any type of matter whatsoever in which the law authorises or requires judicial power to be exercised". In other words, the "unlimited jurisdiction" of the pre-Independence Supreme Court was circumscribed by whatever power that may have been given to it by law.

[107] If the pre-Independence Supreme Court with "unlimited jurisdiction" still required to be given powers by law before it can exercise that jurisdiction, a court with no such unlimited jurisdiction, this court being one such court, must certainly need to be given such powers before it can exercise them.

[108] As mentioned above, there is no dispute that no statute, whether "Federal law" (as defined in art. 162 cl. (2) of the Federal Constitution), or "written law" as defined in s. 3 of the Interpretation Acts 1948 and 1967, provides for the jurisdiction or power of the Court of Appeal to review a matter which it has already finally determined, except in the circumstances provided for in s. 42 and s. 44 of the CJA.

[109] Where common law is concerned, Heliliah Mohd Yusof, FCJ, in *Dato' Seri Anwar*'s case agreed with the dissenting judgement of Abdul Hamid Mohamad, FCJ, (as His Lordship then was) in *Allied Capital Sdn Bhd v. Mohd Latiff Shah Mohd & Another Application* [2004] 4 CLJ 350 that para. 3(1)(a) of the Civil Law Act 1956 is not applicable as a source of additional jurisdiction of the Federal Court.

[110] More importantly, Her Ladyship also referred to the case of *Sia Cheng Soon & Anor v. Tengku Ismail Tengku Ibrahim* [2008] 5 CLJ 201 in which Abdul Hamid Mohamad, CJ, pointed out that the provisions of the Civil Law Act 1956 have no application in criminal cases. Indeed, the long title to the Civil Law Act 1956 states that it is an "Act relating to the civil law to be administered in Malaysia".

[111] There being no statutory provision which can apply the common law of England to a situation such as that before this court in this application, the common law of England cannot be drawn upon to found the basis of an inherent jurisdiction or power that we are urged to exercise.

[112] In *Taylor v. Lawrence*, Lord Woolf (at p. 368 of the judgment) quoted the words of Lord Diplock in *Bremer Vulcan Schiffbau und Maschinenfabrik v. South India Shipping Corp* [1981] 1 All ER 289 at 295, [1981] AC 909 at 977, ("the *Bremer Vulcan* case") in particular the words "the doing by the courts of acts which it needs must have power to do in order to maintain its character as a court of justice" and said that those words "express the situation here under consideration exactly".

[113] Reliance was also placed, in *Taylor v. Lawrence*, on the following oft-quoted speech of Lord Morris of Borth-Y-Gest in *Connelly v. DPP* [1964] 2 All ER 401 at 409, [1964] AC 1254 at 1301:

> There can be no doubt that a court which is endowed with particular jurisdiction has powers which are necessary to enable it to act effectively within such jurisdiction. I would regard them as powers which are inherent in its jurisdiction. A court must enjoy such powers in order to enforce its rules of practice and to suppress any abuses of its process and any attempted thwarting of its process.

[114] Neither in the *Bremer Vulcan* case nor in *Connelly v. DPP* did the court consider the issue of a court re-opening, re-hearing, re-examining or reviewing a matter which it had finally determined.

[115] In the *Bremer Vulcan* case the power that Lord Diplock was speaking of was the High Court's power to dismiss a pending civil action for want of prosecution. *Connelly v. DPP* dealt with the question of whether a person can be prosecuted for the offence of

A robbery after he had been acquitted of murder. The issue there was whether the prosecution for robbery was an abuse of the process of the court.

[116] Prior to *Taylor v. Lawrence*, the statement of Lord Morris
B was considered by Ward LJ in the English Court of Appeal case of *Wicks v. Wicks* [1998] 1 All ER 470. That case dealt with the issue of whether the court had the power to order the sale of property and to apply the proceeds of the sale to meet a wife's claim for ancillary relief.

C **[117]** His Lordship Ward LJ was referred to Sir Jack Jacob's article on 'The Inherent Jurisdiction of the Court', 1970 Current Legal Problems 23 and to the above-quoted speech of Lord Morris of Borth-y-Gest, and said:

D I regret I cannot accept those submissions for these reasons:

(1) There is powerful authority rejecting the contention that the inherent jurisdiction of the court confers a general residual discretion to make any order necessary to ensure that justice be done between the parties. This is too wide and sweeping a
E contention to be acceptable: see Lord Hailsham's curt dismissal of Lord Denning's attempt to do justice in *Siskina (Cargo Owners) v. Distos SA* [1979] AC 210, 262 and also Ackner LJ's comments in *Aj Bekhor & Co Ltd v. Bilton* [1981] QB 923, 942. The fact that these were cases dealing
F with the impact of inherent jurisdiction on the power to make injunctions does not seem to me to devalue the strength of the critical observations.

(2) In my judgment, it seems upon proper analysis that the power the applicant wives were inviting the court to assume was not
G a procedural power to control the court's process but a substantive power affecting the right of the applicant to the relief which she was seeking. The need to distinguish between procedural rights and substantive rights was clearly drawn in *Moore v. Assignment Courier Ltd* [1977] 1 WLR 638. Here the claims were for possession of demised premises on the grounds
H of forfeiture for breaches of covenant, and also for mesne profit. The issue raised was whether, pending a determination of the landlord's forfeiture action, the landlord was entitled to be paid a periodic interim sum for the use of the land. Section 20 of the Administration of Justice Act 1969 had empowered
I the court to make rules requiring a party to make an interim

payment of debt or damages. No rules had yet been made. The claim was, therefore, brought under the inherent jurisdiction relying on a dictum of Lord Denning MR in *Tiverton Estates Ltd v. Wearwell Ltd* [1975] Ch 146, 156D:

> These courts are masters of their own procedure and can do what is right even though it is not contained in the rules.

Of that Sir John Pennycuick said at 642:

> I think that in its context that sentence is plainly addressed to matters of procedure and is not intended to say that the court can, in matters of substantive right, do whatever the court thinks fair, apart from the principles applicable under either the general law or the Rules of the Supreme Court.

The same reasoning applies here. Under the cloak of ensuring fair play, the judge was in fact making orders affecting the parties' substantive rights and that must be governed by the general law and rules, not by resort to a wide judicial discretion derived from the court's inherent jurisdiction.

In his interesting article, *'The Inherent Jurisdiction To Regulate Civil Proceedings'* [1997] 113 LQR 120, 131 Professor Dockray writes:

> ... a matter which is procedural from the position of an applicant may be constitutional in the eyes of the respondent ... Where procedure is as important as substance, procedural change requires the same degree of political accountability and economic and social foresight as reform of an equivalent rule of substantive law. Major innovations in procedural law should therefore be recognised as an institutional responsibility, not a matter on which individual judges should respond to the pleas of particular litigants. Procedural revolutions should appear first in statutes or in the rules of court, not in the law reports.

[118] In *Dato' Seri Anwar*'s case Mohd Ghazali Mohd Yusoff, FCJ, came to the conclusion that the Federal Court has not been granted power by the Federal Constitution or the CJA or even r. 137 of the Rules of the Federal Court to review its own decision.

[119] After referring to several English and Indian cases, and the same article by Professor Dockray referred to in *Wicks v. Wicks* (different parts of which were quoted by His Lordship), Mohd Ghazali Mohd Yusoff, FCJ, was also of the view that the Federal Court has no inherent power to review its own decision. He said:

> Since this court has no power to review its own decision given in an appeal it has already heard and disposed of, I cannot see how it can be said that there are exceptions to this right to review as suggested by some earlier decisions of this court or that the power of review can be exercised in exceptional circumstances but should be exercised sparingly.

[120] His Lordship's reasons and conclusions apply equally to the Court of Appeal as they apply to the Federal Court.

[121] It was pointed out to this court by learned counsel for the applicant that His Lordship's views constituted a "minority view" in that the other two members of the same panel, while dismissing the application before them, were of the view that, in exceptional circumstances, there can be a review of a decision of the Federal Court.

[122] As has been mentioned above, the judgement of the Federal Court in *Abdul Razak Dalek*'s application is not available. However, the applicant did not dispute DPP Awang Armadajaya's version of what transpired in the hearing of that application.

[123] There is no doubt that *Abdul Razak Dalek*'s application was dismissed on the preliminary objection that the court had no jurisdiction to review its earlier decision.

[124] In the light of the decision in *Abdul Razak Dalek*'s application, the decision of Mohd Ghazali Mohd Yusoff, FCJ, is in fact no longer a "minority" view.

[125] On 26 August 2010, two weeks after the decision in *Abdul Razak Dalek*'s application, the Federal Court heard an application by Felda for the review of the decision of the Federal Court on 19 January 2010 refusing leave to appeal against a decision of the Court of Appeal. A report on 26 August 2010 by Bernama, the national news agency, and on 27 August 2010 by the newspaper The New Straits Times states that the Federal Court had

unanimously dismissed that application. Alauddin Mohd Sheriff, PCA, who chaired the panel was reported by Bernama to have said that "we find that we have no jurisdiction to review the previous decision of the Federal Court".

[126] As in *Abdul Razak Dalek*'s application, the judgement of the Federal Court in the Felda application is not yet available. However, the two decisions show that the Federal Court no longer subscribes to the view that it has jurisdiction to review its earlier decisions.

Conclusion

[127] In the circumstances, it is my view that the re-opening, re-hearing, re-examination or review of a matter which has already been finally determined by a court is not merely a procedural issue but is a substantive one. It is therefore a matter of jurisdiction. Unless and until jurisdiction is granted by law, this court has no such jurisdiction.

[128] As such jurisdiction has not been granted by the Federal Constitution or by or under any federal law, or by the common law as it is applicable in this country, this court has no jurisdiction to hear this application. The preliminary objection of the respondent is therefore allowed. This application is dismissed.